OHIO COURT QUESTIONS CONSTITUTIONALITY OF REQUIREMENT OF SENATORIAL ADVISE AND CONSENT

State, ex rel. Burns v. DiSalle, Governor
172 Ohio St. 363, 176 N.E.2d 428 (1961)

The respondent, the Governor of Ohio, appointed Harry Hoffheimer to the State Racing Commission. Pursuant to state law, the governor reported the appointment for confirmation to the Senate. However, the Senate adjourned without taking action on the appointment. The relator alleged in his petition that since the Senate had failed to advise and consent to the appointment of Hoffheimer, a writ of mandamus should issue compelling the governor to make a new appointment. Respondent's second defense was "that any provision of Section 3769.02 which makes or purports to make such appointment contingent upon the advice and consent of the Senate is unconstitutional and void as making the General Assembly a participant in the appointing power in contravention of Section 27 Article II of the Ohio Constitution."[1] The Supreme Court of Ohio unanimously held section 3769.02 to be repugnant to Article II, Section 27 of the Ohio Constitution.

The problems involved in the decision raise policy questions which plagued the founders of this country in 1787 and which have continued to be a source of dispute to the present time. These policy questions involve the extent to which a system of checks and balances should modify the underlying privilege of separation of powers, and, more specifically, the proper extent of legislative participation in the appointment of executive officers.

The framers of the Ohio Constitution attempted to resolve the specific problem by inserting the provision that:

> The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the General Assembly, except as prescribed in the Constitution and in the election of United States senators; and in these cases the vote shall be taken 'viva voce.'[2]

The phraseology of this section is ambiguous in several respects, but in the instant case only two terms are of primary importance. The term "appointing power" was in dire need of interpretation, and the supreme court, to a certain extent, obliged. The court came to the conclusion that

1 State, *ex rel.* Burns v. DiSalle, Governor, 172 Ohio St. 363 (1961). Respondent's first defense was that since the appointment of Hoffheimer had been submitted to the Senate for confirmation or rejection he had fully complied with his obligations under the law.

2 Ohio Const. art. 2, § 27.

the requirement of senatorial advice and consent for confirmation of an appointment to state office is an integral part of the appointing power itself, as that term is used in the constitution, and, as such, is repugnant to that instrument. The only case cited by the court in support of its decision was *State ex rel. Attorney General v. Kennon.*[3] That case defined "appointing power" as follows:

> The phrase 'appointing power,' as here used, is one of no ambiguous signification. When employed in reference to matters pertaining to government, or to the distribution of the powers of government, it means the power of appointment of office—the power to select and indicate by name individuals to hold office, and to discharge the duties and exercise the powers of officers.[4]

This definition certainly connotes the idea that in order to have the appointing power, a governmental unit must have the power to "select and indicate by name" who shall "discharge the duties and exercise the powers of officers." Does the statutory requirement of senatorial advice and consent confer such power on the General Assembly? The answer of course depends upon the meaning of "advice and consent." If that phrase means that the Senate shall convene with the governor and they shall choose a name suitable to both, then it can be construed as a part of the appointing power, and if the Senate in this situation corresponds to the General Assembly, a statute requiring such advice and consent is void under the constitution. If, on the other hand, "advice and consent" is to be considered as a confirmation and, in effect, acts only as a negative check on the nomination of the governor, then the Senate does not have the power to "select and indicate by name individuals. . . ." Assuming this construction, confirmation does not fall within the definition of appointing power as set forth in the *Kennon* opinion. The latter construction seems to be widely accepted.[5]

An interpretation finding no constitutional objection to a requirement that the Senate advise and consent is plausible only if the distinction between appointing power and confirmation is conceded, and the requirement of advice and consent is considered solely as a confirmation. That both of these premises are considered valid is manifested by several constitutions of other states.[6] These provide that the governor shall nominate, and by

---

[3] State, *ex rel.* Attorney General v. Kennon, 7 Ohio St. 546 (1857). It should be noted that in this case the term "appointing power" was discussed in relation to a completely different question, i.e. whether the General Assembly had the power to select men to sit as a board for the purpose of appointing the directors of the state penitentiary and the state house commissioners.

[4] *Id.* at 556.

[5] See State, *ex rel.* Allen v. Ferguson, Aud. 155 Ohio St. 26, 33, 97 N.E.2d 660 (1951) where the terms "advice and consent" and "confirmation" are impliedly used synonymously. See People *ex rel.* MacMahon v. Davis, 284 Ill. 439, 120 N.E. 326 (1918) and 44 O. Jur.2d 49 (1960) where it is stated that "a confirmation of an appointment to a public office is to be distinguished from the appointment itself, for in confirming the appointment the Senate or other body does not in any sense choose the appointee."

[6] Ill. Const. Art. 5, § 10, which reads: "The governor shall nominate, and by and

and with the advice and consent of the senate appoint officers, while in the same sentence declaring that no such officers shall be appointed by the legislature. It is manifest that the framers of these other state constitutions did not consider senatorial advice and consent as synonymous with the appointing power which was expressly denied to the legislature. If the term advice and consent were so construed to be a part of the appointing power, these provisions would make no sense whatsoever.

The problem involved could not arise under the United States Constitution for there is no provision in that document explicitly denying to the Senate the power to appoint. The President is given the power to nominate, and by and with the advice and consent of the Senate, appoint certain important officers. However, the Congress may vest the appointment of such inferior officers as they think proper in the President alone.[7] "The object of this provision is to confer on the president a power which he would not otherwise have possessed,"[8] but whatever the object, the effect of the provision is to give the Senate a negative check on the appointing powers of the President.

Turning to an analysis of the history preceding the constitutional provision and the purpose behind its adoption, the question becomes one of the effect which the members of the constitutional convention intended article II, sec., 27 to have upon the appointing power of the General Assembly. The *Kennon* opinion states that the existence of legislative patronage was a prominent mischief to be corrected at the constitutional convention. It was generally believed that the members of the legislature made a practice of exchanging votes for offices. In order to accomplish the desired result of eliminating this practice, did the committee on revision intend the phrase "no appointing power" to destroy the confirming power in the Senate?

Three reasons support a negative answer to this question. First, a body having only a negative check upon the nomination of another—that is a body which does not have the power to select, by name, individuals to fill appointive offices—is not in a position to exchange such offices for votes.

Second, if the predominant theme of the constitutional convention was to restrict the possibility of corruption in the state government, it would seem strange that the committee would be so willing to give such unbridled power to one person where the working of corruption, if he so desired, would be infinitely easier.

Third, the available legislative history indicates that although the framers intended to eliminate the appointing power in the General Assembly,

---

with the advice and consent of the Senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such offices shall be appointed by the General Assembly." See also N.J. Const. Art. 4, 5, and Art. 1, 12.

[7] U.S. Const. Article II, § 2.

[8] 42 Am. Jur. 112 (1942); State *ex rel.* Standish v. Baucher, 3 N.D. 389, 56 N.W. 142 (1893).

they had no intention of similarly eliminating the confirming power in the Senate.[9]

The fact remains that the Supreme Court of Ohio elected to ignore the distinction between the terms "appointing power" and "confirmation" to hold unconstitutional a requirement of Senate advice and consent. Possibly it was the actual intention of the delegates to the Constitutional Convention of 1851 to begin in Ohio the growing movement to reorganize state administration by taking from the Senate the power of confirmation; or perhaps the Ohio court was prompted to rule as it did by the recent trend toward vesting more authority in the executive branch. If the decision was rested upon policy considerations, the attempt by the court to become the state's philosopher was abortive. On November 7, 1961, the voters of Ohio, by approving a proposed amendment to the constitution which would require the governor to submit his nominations to the senate for approval, demonstrated that they are as yet not ready to relinquish this check on the power of the executive branch.

---

[9] In explanation of the intent of the framers of this provision the *Kennon* court quotes Mr. Reemelin, the man who drew up the reports of the committee on the legislative department, as saying the purpose of the committee to be "that no appointing power—not the least vestige—would be left to the General Assembly." The court in the instant case evidently assumes this to mean that the intent was that not even the power of confirmation would be left to the Senate. However, this interpretation seems questionable in light of the fact that Mr. Reemelin, only three lines above the preceding quotation, stated that "he did not know but he would be willing to authorize the legislature to give this appointing power to the Governor, to be exercised by and with the advice and consent of the Senate or the General Assembly; but he desired to take away from the General Assembly all power to create offices, for the sake of filling them with MEMBERS OF THEIR OWN BODY. He was willing that the General Assembly should exercise all legitimate powers, but he desired to prevent them from grasping further." 1 Ohio Debates 259.